DISSENTING OPINION OF JUDGE MORELLI

[Translation]

I voted against the decision upholding the Court's jurisdiction because I am of the opinion that, if a dispute really existed between Ethiopia and Liberia on the one hand and South Africa on the other with the subject set forth in the Applications, such a dispute would not be subject to the jurisdiction of the Court. I think however that, before taking up the question of jurisdiction, the Court should have sought to establish whether a dispute existed between the Parties.

I

1. The third of the preliminary objections submitted by South Africa sought in fact to deny the existence of a dispute between that State, on the one hand, and Ethiopia and Liberia on the other. Reference was made to Article 7 of the Mandate, which postulates the existence of a "dispute" between the Mandatory and another Member of the League of Nations; and the assumption was made, for the purposes of this objection, that that article is in force and capable of being invoked by the Applicant States; which was denied by the first two preliminary objections.

If the requirement of the existence of a dispute, for the Court to be able to exercise its function by a decision on the merits, depended solely upon Article 7 of the Mandate, consideration of the question of the satisfaction of that condition could only be undertaken after a finding, or on the assumption, that Article 7 of the Mandate is still in force. But the requirement is laid down, in the first place, by the Statute and the Rules of Court.

2. The Statute indeed states, in Article 38, that the function of the Court "is to decide in accordance with international law such disputes as are submitted to it". In other provisions of the Statute the concept of a dispute is most frequently indicated by the term "case": for instance, *inter alia*, in Article 40, concerning the means by which "cases" are brought before the Court, and in the first paragraph of Article 36, which lays down the "cases" comprised in the jurisdiction of the Court. But it is quite clear from paragraph 2 of Article 36, where, still with reference to the jurisdiction of the Court, the allusion is to legal "disputes", that the "cases" referred to in paragraph 1 must consist of disputes. The word "*différend*" is to be found also in the French text of Article 62.

So far as the Rules are concerned, it is the word "case" which is generally employed in the provisions of Heading II. But if regard

is had to the title given to this heading ("Contentious Proceedings") there can be no doubt that the "cases" there contemplated are necessarily made up of disputes; this is in contrast with the functions exercised by the Court on the basis of Heading III, which is concerned with Advisory Opinions. Furthermore it is the subject of the "dispute" which is referred to in Article 32, paragraph 2, of the Rules.

From the whole body of provisions in the Statute and the Rules it is therefore clear, beyond any possibility of doubt, that, in accordance with the Statute and the Rules themselves, the Court cannot exercise its function in contentious proceedings, by giving a decision on the merits, unless a dispute genuinely exists between the parties. The absence thereof would require to be found by the Court even *proprio motu*. In the present case it is the Respondent State which has raised the question by denying the existence of a dispute between itself and the Applicant States. The fact that the Respondent raised the point with reference to Article 7 of the Mandate (which is assumed, for purposes of argument, to be in force) clearly was no bar to the Court's considering the question of the existence of a dispute from the point of view of the consequences to be drawn from a negative finding on that issue on the basis of the Statute and the Rules: independently, therefore, of the issue whether Article 7 of the Mandate is at present in force.

This is a question which, strictly speaking, does not relate to the jurisdiction of the Court: a problem which, indeed, arises prior to any question of jurisdiction, for the very simple reason that it is only in relation to a genuinely existing dispute that it is possible to raise the question whether such a dispute is or is not subject to the jurisdiction of the Court. It follows that if the Court finds that no dispute exists between the parties, it will not be called on to pass upon its jurisdiction itself; it must, in that case, confine itself to a finding that the claim is inadmissible.

3. It must be pointed out that, although, as will be seen hereafter, a dispute cannot exist without a certain attitude of the will of one, at least, of the parties, a dispute is a fact capable of being objectively found. A dispute is one thing; the opinion of one or other of the parties as to the existence of a dispute is something different. In its Opinion on the *Interpretation of Peace Treaties* the Court said: "whether there exists an international dispute is a matter for objective determination. The mere denial of the existence of a dispute does not prove its non-existence." (*I.C.J. Reports 1950*, p. 74.) But it might equally be said: the mere assertion of the existence of a dispute by one of the parties does not prove that such a dispute really exists.

If no dispute exists it is not possible to set the machinery of the Court in motion. In accordance with the Statute and the Rules proceedings before the Court can only be instituted on condition

that a dispute really exists; the opinion of one of the parties as to the existence of a dispute is by no means sufficient.

4. There is one further preliminary observation to be made. The existence of a dispute must be established with reference to the time when the Application was filed. This principle was recognized and applied by the Permanent Court in its Judgment in the case concerning the *Electricity Company of Sofia and Bulgaria*. In this Judgment the Court declared that the Belgian Application could not be entertained *["irrecevable"]* in so far as concerned part of the claim, on the ground that the Belgian Government had not proved that, *before the filing of the Application*, a dispute had arisen between the Governments respecting the Bulgarian law of 3 February 1936 (P.C.I.J., Series A/B, No. 77, p. 83). In this connection the Permanent Court considered the matter from the point of view of the Treaty of 1931 as well as from the point of view of the declarations of adherence to the Optional Clause. Thus, by this reference to the Optional Clause, the Court gave an interpretation, although an indirect one, of the system of the Statute.

II

1. South Africa has referred, as have Ethiopia and Liberia, to the definition of a dispute given by the Permanent Court in its 1924 Judgment in the *Mavrommatis Concessions* case. But that was no more than a first attempt at definition. After so many years, it is not, in my opinion, possible to keep to that definition in disregard of the thorough analysis to which the concept of an international dispute has since been subjected by writers.

The definition given by the Permanent Court is as follows: "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons." (P.C.I.J., Series A, No. 2, p. 11.) Since a disagreement on a point of law and a conflict of legal views are the same thing, it may be said that, according to the Permanent Court's definition, a dispute may consist either of a disagreement on a point of law or fact or of a conflict of interests.

As to a disagreement upon a point of law or fact, it is to be observed that, while such a disagreement may be present and commonly (but not necessarily) is present where there is a dispute, the two things (disagreement and dispute) are not the same. In any event it is abundantly clear that a disagreement on a point of law or fact, which may indeed be purely theoretical, is not sufficient for a dispute to be regarded as existing.

As to a conflict of interests, it is quite true that, as will be seen hereafter, a dispute necessarily bears a certain relationship with a

conflict of interests (real or supposed). But a conflict of interests is likewise not the same thing as a dispute. A conflict of interests can moreover exist without there being any corresponding dispute. This case is in no way exceptional; it is, on the contrary, the normal case. It is sufficient to reflect that international society as a whole is the result of relationships existing between the interests of different States; interests which are very frequently opposed without its being necessary on that account to suppose that disputes exist between the States concerned.

2. In my opinion, a dispute consists, not of a conflict of interests as such, but rather in a contrast between the respective attitudes of the parties in relation to a certain conflict of interests. The opposing attitudes of the parties, in relation to a given conflict of interests, may respectively consist of the manifestations of the will by which each of the parties requires that is own interest be realized. It is the case of a dispute resulting, on one side, from a claim by one of the parties and, on the other side, of the contesting of that claim by the other party. But it may also be that one of the opposing attitudes of the parties consists, not of a manifestation of the will, but rather of a course of conduct by means of which the party pursuing that course directly achieves its own interest. This is the case of a claim which is followed not by the contesting of the claim but by the adoption of a course of conduct by the other party inconsistent with the claim. And this is the case too where there is in the first place a course of conduct by one of the parties to achieve its own interest, which the other party meets by a protest.

It follows from what has been said that a manifestation of the will, at least of one of the parties, consisting in the making of a claim or of a protest is a necessary element for a dispute to be regarded as existing. By this manifestation of the will the party in question asserts the requirement of the realization of an interest of its own. It asserts, in the case of a claim, the requirement that that interest be realized by means of a certain course of conduct to be followed, or, in the case of a protest, the requirement that its interest should have been realized by a course of conduct on the part of the other party contrary to the course which was in fact adopted.

3. The concept of a dispute which I have just given is not inconsistent with what is said in Article 36, paragraph 2, of the Statute of the Court.

It appears from that provision that it is possible to refer to the Court a question of international law or a question concerning the existence of a fact. It is, however, beyond doubt that the existence of a question, although the subject of controversy, on a point of law or fact is not sufficient to enable that question to be referred to the Court. For that to be possible, it is necessary that the question

should be in a certain relationship with a dispute, in the sense that the settlement of the dispute must depend upon the answer to be given to that question of law or fact. In other words, where there is a dispute, it is possible that proceedings should be instituted, not for the purpose of securing a decision on the dispute as a whole, but solely to resolve a question of law or fact which will affect the settlement of the dispute.

It is precisely "disputes" to which reference is made in paragraph 2 of Article 36. This provision, however, in referring to disputes "concerning" *["ayant pour objet"]* a question of international law or the existence of a fact adopts a terminology which is not the most appropriate to indicate the relationship which must exist between the dispute and the question to be referred to the Court. It would be entirely correct to speak of a question constituting the subject-matter *[formant l'objet]* of proceedings. It is less correct to say that a question constitutes the subject of a dispute *[l'objet d'un différend]*: to speak, for instance, as does paragraph 2 of Article 36, of a dispute concerning *[ayant pour objet]* the existence of a fact which, if established, would constitute a breach of an international obligation. In the hypothesis envisaged by these words, the subject of the dispute *[l'objet du différend]* is the reparation claimed; the existence of the fact, which might constitute a breach of an international obligation, is the subject *[objet]*, not of the dispute, but of a question the solution of which is necessary for the settlement of the dispute.

III

1. On the basis of the concept of a dispute which I have indicated, it becomes necessary to ascertain whether a dispute exists between South Africa, on the one side, and Ethiopia and Liberia on the other, or between South Africa and one or other of these two States. Or, more correctly, it is necessary to ascertain whether a dispute existed at the time when each of the two Applications was filed.

It is possible to think that in the present case there does exist one of the constituents of a dispute, which consists in the course of conduct in fact pursued by South Africa in the exercise of the Mandate over South West Africa. It therefore becomes necessary to see whether in addition to that element there was present the other element making it possible to say that there does exist a dispute. That is to say, whether there was present an opposing attitude on the part of Ethiopia and Liberia or on the part of one or other of these two States. Such an attitude could consist only in a manifestation of will: either in a prior claim designed to secure a course of conduct by South Africa different from that in fact pursued; or in a subsequent protest against that course of conduct.

Since what has to be ascertained is whether a dispute had arisen before the institution of the present proceedings, it is necessary to ascertain whether, before the filing of the Applications, there was a

claim or a protest on the part of Ethiopia and Liberia. It follows that a claim or a protest on the part of those States which it might be sought to infer from the Applications themselves or from the pleadings in the case cannot be taken into account, because they cannot be regarded as the constituents of a dispute having the character of a dispute existing prior to the filing of the Applications.

2. It would only be possible to speak of a claim by Ethiopia and Liberia, as providing a constituent element of a dispute between those States and South Africa, if the course of conduct of South Africa constituting the subject-matter of the claim had been regarded by Ethiopia and Liberia as susceptible of realizing an interest which was the interest of those States. Similarly, it is only if a certain course of conduct by South Africa was considered by Ethiopia and Liberia as infringing some interest of these latter States that it would be possible to speak of a protest by those States susceptible of giving rise to a dispute between them and South Africa.

The Respondent, in its third Preliminary Objection, denied that the interests of the Applicants or of their nationals were in issue. The Respondent referred, in this connection, to the provisions of the Mandate and in particular to Article 7.

3. So far as interest is concerned, a distinction must be drawn between certain problems which are entirely different.

A question might arise with regard to the interpretation of the substantive provisions of the Mandate, for the purpose of ascertaining what are the interests of States Members of the League of Nations which these provisions are designed to protect by conferring upon those States corresponding subjective rights. This is a question touching the merits of the case: a question which, as such, could not be examined in the present phase of the proceedings.

A different question, although to some extent connected with the previous one, is that concerning the interpretation of the clause contained in Article 7, paragraph 2, of the Mandate. Since this clause refers to disputes relating to the interpretation or the application of the provisions of the Mandate, it might be asked what interests of a State Member of the League of Nations have to be affected by a dispute to make it possible to regard that dispute as within the terms of Article 7 of the Mandate. If the clause is regarded as a true jurisdictional clause (which in my view is by no means certain) the question thus stated would be one relating to the jurisdiction of the Court.

But there is yet another question: a question which indeed is a preliminary one in relation to the question of jurisdiction. It is necessary to determine, not whether a certain dispute is or is not subject to the jurisdiction of the Court, but whether any dispute

whatever exists between the Parties. This question could arise with reference to Article 7 of the Mandate which, clearly, could not operate if no dispute existed. But, as has been said, this same question must first and foremost arise with reference to the provisions of the Statute and the Rules of Court. It is necessary to determine whether it is possible to deny the existence of a dispute between the Parties, by denying, as South Africa has done, that any interests of the Applicant States or of their nationals are involved.

4. The answer to such a question could not be other than in the negative.

I have said that a dispute must necessarily be in a certain relationship with a conflict of interests, because it is the result of opposing attitudes by the parties with regard to a conflict of interests. But this does not mean that a conflict of interests must genuinely exist before a dispute can be said to exist. Instead of a genuine conflict of interests, there could be a conflict of interests existing only in the subjective representation of one of the parties. This applies not only to the relationship of conflict between the two interests but also to the issue of the existence of an interest. Each State is the judge of its own interest. If a State, believing itself to have a certain interest, advances a claim designed to secure a particular course of conduct which it considers appropriate to satisfy its interest, or makes a protest against a course of conduct by another State which it regards as infringing its interest, that claim or that protest may well constitute one of the elements of a dispute, independently of the real existence of the interest in question.

It is unnecessary for me to say that, when I speak of interest, I am using that word in its true sense. I disregard any protection which the law may accord to a certain interest by granting a subjective right or by the means (known to municipal rather than to international law) of what is referred to as a legitimate interest. I refer solely to an interest as such, that is to say, what might be called a material interest, in contrast with a legal or legitimate interest.

5. From what I have just said it follows that if, before the filing of the Applications, there had been, on the part of Ethiopia and Liberia, a claim or a protest directed against South Africa and relating to an interest regarded by the two former States as being their interest, the existence of a dispute could not be denied by contesting the existence of that interest. The attitude of Ethiopia and Liberia would in this respect be decisive. The reference, by Ethiopia and Liberia, to an interest regarded by them as being their interest, might be inferred from the fact that these States had invoked (as they subsequently did in the proceedings before the Court) the provisions of the Mandate in order to derive there-

from a subjective right (or a legitimate interest) which pertained to them in respect of the exercise of the Mandate. The actual existence of that subjective right (or legitimate interest) would be of no importance in respect of the question with which we are at present concerned. The mere assertion of the subjective right (or of the legitimate interest) would be decisive because it would imply the assertion, by Ethiopia and Liberia, of a material interest belonging to them.

IV

1. In what way are the Applicants States said, before the filing of the Applications, to have made known their views concerning the exercise of the Mandate for South West Africa?

It has been said, in the first place, that both Ethiopia and Liberia had directly participated in the debates, deliberations and proceedings of the General Assembly of the United Nations and of the Fourth Committee of the General Assembly, making clear their position on the matters in dispute. Moreover, Ethiopia was a member of the Committee on South West Africa established by the General Assembly in 1953 to negotiate with South Africa with a view to the implementation of the Court's Advisory Opinion of 11 July 1950.

Leaving aside the direct participation of the Applicant States in the activities of the above United Nations organs, it has been asserted that negotiations with South Africa were conducted, on behalf of the Applicant States "and other Members of the United Nations", by the United Nations *Ad Hoc* Committee on South West Africa and by the United Nations Good Offices Committee (and in respect of Liberia also by the aforementioned Committee on South West Africa established in 1953, of which Liberia itself was not a member).

2. As regards the direct participation of the Applicant States in the activities of certain United Nations organs, it must be observed that, by such participation, those States acted solely in their capacity as members of a collegiate organ of the United Nations. Acting in that capacity they made statements of intention designed to be combined with corresponding statements by other members of the collegiate organ so as to shape the intention of that organ and, thereby, the intention of the United Nations. Acting in their capacity as members of a United Nations collegiate organ Ethiopia and Liberia took up a position from the viewpoint of the Organization. They were guided not by their individual interest but by what they considered to be the interest of the Organization. They had in mind the exercise of an alleged right of the Organization and not of a right belonging to them individually.

In the Applications it is stated that Ethiopia and Liberia have

continuously sought to assert and protect their legal interest in the proper exercise of the Mandate by disputing and protesting the violation by South Africa of its duties as Mandatory. If, as in the absence of other information in this connection it seems necessary to assume, this assertion is intended to refer to statements made by Ethiopia and Liberia in United Nations organs, it may readily be observed that the disputations and protestations sought to be inferred from such statements cannot be considered as the means for Ethiopia and Liberia of asserting an interest which is their own interest.

That being so, it is not possible to regard the attitude taken by Ethiopia and Liberia in United Nations organs as one of the elements necessary for a dispute to be considered as existing between those States on the one hand and South Africa on the other.

3. This conclusion is not necessarily linked with the view that the United Nations must be recognized as having a legal personality which is distinct from the personality of the Member States.

From the standpoint of such a view (which is the most widely held and one accepted by the Court) a very clear distinction would have to be made between the activities of the Organization on the one hand and those of Member States on the other. Contrariwise, for the doctrine which denies the Organization a legal personality of its own, the activities of organs of the United Nations would legally be activities of the Member States. However, that would have no effect on the answer to the question whether a dispute exists between South Africa on the one side and Ethiopia and Liberia on the other; a question which would still have to be answered in the negative. In fact, the manner in which the attitude adopted by Ethiopia and Liberia in United Nations organs would have to be appraised would in no wise be altered, even if it were approached from the standpoint of the above-mentioned doctrine. It would still be an attitude not guided by the individual interest of those States; it matters little that, on this approach, it is not the interests of the Organization but rather the collective interests of its States Members which would have to be regarded as involved.

4. However, still from the standpoint of the doctrine which denies legal personality to the Organization, there is another aspect to be considered, and one which does not concern particularly Ethiopia and Liberia and the other States which took a similar attitude in United Nations organs, but all the Member States of the United Nations, irrespective of their participation in United Nations organs which took an interest in the problem of South West Africa and irrespective also of their attitude in those organs with regard to that problem.

It has already been said that from the standpoint of the doctrine

which denies legal personality to the Organization, the activities of United Nations organs must legally be regarded as being activities of all the States Members. Must it be concluded from this that it is possible to infer from certain resolutions of United Nations organs an attitude which is that of all the States Members? An affirmative answer to this question might be regarded as implied in the assertion of the Applicants recalled above to the effect that certain organs of the United Nations acted on behalf of the Applicants "and other Members of the United Nations" (this assertion necessarily presupposing a negative reply to the question of the legal personality of the Organization). The consequence of such an answer would be that a dispute would have to be regarded as existing between South Africa on the one side, and, on the other, all the States Members of the United Nations and not only those which, like Ethiopia and Liberia, took up a certain position in United Nations organs with regard to the problem of South West Africa. This is precisely the result which the Applicants seem to arrive at.

Thus from the standpoint which I have just described it would be necessary to have regard not to the statements made by Ethiopia and Liberia in United Nations organs but rather to the decisions of those organs, which in law would be attributed to all the States Members of the United Nations and hence to Ethiopia and Liberia also. However, those decisions, in the same way as the statements and votes of the States Members of the organ taking them (or, rather, even more so than such statements or votes), are guided, not by the individual interest of each State Member of the United Nations, but rather by the collective interest of all the States Members as a group. Consequently, such decisions are not the expression of a position taken by each State Member of the United Nations considered individually with regard to the problem of the exercise of the Mandate for South West Africa, and so they are not capable of giving rise to a dispute between each State Member, considered individually, and South Africa.

V

1. For the reasons which I have given, the conclusion must in my view be reached that there was not a dispute between Ethiopia and Liberia, on the one side, and South Africa, on the other, at the time of filing of the Applications. It follows that the claims put forward in those Applications should be held to be inadmissible.

2. Since I have been discussing the inadmissibility of the claims, I consider it necessary to add a few words concerning the terms "admissibility" and "inadmissibility", which, in the use which has frequently been made of them, have been given different meanings.

They have sometimes been used to indicate the presence or absence of jurisdiction (as in the Judgment of the Permanent Court in the *Phosphates in Morocco* case—P.C.I.J., Series A/B No. 74, p. 29—which decides in the French text that the Application is not *"recevable"*, and in the English text that it "cannot be entertained"). Inadmissibility has also been discussed (as was done by this Court in the *Nottebohm* case—*I.C.J. Reports 1955*, p. 26) even in connection with the lack of nationality of the claim, which latter question clearly goes to the merits of the case. I need not repeat here that the Judgment of the Permanent Court in the *Electricity Company* case declared that the Belgian Application could not be entertained *["irrecevable"]*, in so far as concerned part of the claim, precisely because of the non-existence of a dispute.

It does not appear to me correct to qualify a claim as inadmissible because of lack of fulfilment of one of the conditions on which the substantive right of the Applicant depends; the claim, far from being deemed inadmissible, is then judged as to its merits and dismissed by a decision which is indeed a decision on the merits. Admissibility can relate only to conditions lack of fulfilment of which prevents a decision on the merits. Within these limits, however, it is quite possible to give the term a very wide meaning so as to refer to all the conditions having that character, including jurisdiction.

The question of terminology is of only secondary importance. It will be sufficient to observe that if the term is used in the very wide sense to which I have just referred, it must be recognized at the outset that among the conditions for admissibility there are others than those relating to jurisdiction. But what is above all of interest here is the fact that among these latter conditions there are some which must be considered before the question of jurisdiction is considered. One of these, for example, is the condition of validity of the application, because a Court which is not validly seized cannot adjudicate even on its jurisdiction. Another such is the condition of the existence of a dispute, since it is only with relation to a genuinely existing dispute that it is possible to decide whether such a dispute is subject or not to the jurisdiction of the Court to which it has been referred.

(Signed) Gaetano MORELLI.